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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY INC., Plaintiff, vs. DIGITAL POINT SOLUTIONS, INC.; SHAWN HOGAN; KESSLER's FLYING CIRCUS; THUNDERWOOD HOLDINGS, INC.; TODD DUNNING; DUNNING ENTERPRISES, INC.; BRIAN DUNNING; BRIANDUNNING.COM; and DOES 1-20, Defendants.	CASE NO. C 08-4052 **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT BY DEFENDANTS THUNDERWOOD HOLDINGS, INC., BRIAN DUNNING AND BRIANDUNNING.COM; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; REQUEST FOR JUDICIAL NOTICE; DECLARATION OF LEO J. PRESIADO** [Compendium of Exhibits filed separately] [FRCP 12(b)(1), 12(b)(6) and 12(b)(3)] DATE: December 12, 2008 TIME: 9:00 a.m. CTRM: 3 Hon. Jeremy Fogel presiding

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and/or 12(b)(3), Defendants Thunderwood Holdings, Inc., Brian Dunning and BrianDunning.com (collectively, "Defendants") will and hereby do move to dismiss the First Amended Complaint (the "Complaint") filed by Plaintiff eBay, Inc. ("Plaintiff" and/or "eBay"). The hearing on the motion will be at 9:00 a.m. on December 12, 2008, or as soon thereafter as the parties may be heard before the Honorable Jeremy Fogel in Courtroom 3 of the United States District Court for the Northern District of California, located at 280 South 1st Street, San Jose, California.

This Motion is and will be made on the grounds that the Complaint fails to state a claim upon which relief may be granted (Rule 12(b)(6)), lack of subject matter jurisdiction (Rule 12(b)(1)), and improper venue (Rule 12(b)(3)). This motion is based on the Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; all supporting papers, including the Declaration of Leo. J. Presiado, Request for Judicial Notice, Compendium of Exhibits; the Complaint; all other pleadings and papers on file in this action; and such other arguments and papers as may be permitted by the Court.

DATED: October 27, 2008

RUS, MILIBAND & SMITH
A Professional Corporation

By: ______________________
LEO J. PRESIADO
Attorneys for Defendants
Thunderwood Holdings, Inc., Brian Dunning
and BrianDunning.com

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

The First Amended Complaint ("Complaint') filed by Plaintiff eBay, Inc. ("Plaintiff" and/or "eBay") includes two federal claims which are wholly without merit and made solely for the improper purpose of obtaining federal court jurisdiction.[1]

Defendant Brian Dunning is the founder and sole shareholder of Defendant Thunderwood Holdings, Inc. ("Thunderwood").[2] Thunderwood together with Mr. Dunning's brother, Defendant Todd Dunning, do business as Kessler's Flying Circus ("KFC"). Until recently, KFC was in the business of implementing internet marketing programs on behalf of internet merchants such as eBay. More specifically, with respect to eBay, KFC was under contract with eBay and eBay's agent Commission Junction, Inc. ("CJ") to promote and direct on-line traffic to eBay's website. KFC was paid by eBay via its agent CJ pursuant to a commission structure based on the amount of on-line traffic visiting eBay's website as a result of KFC's efforts, as well as the number and amount of sales by eBay generated from such traffic.

Plaintiff alleges in the Complaint that Defendants defrauded it by placing "cookies" on internet user's browsers which "redirected the user's computer to the eBay site" without the user's knowledge thereby causing "KFC to receive payment for actions by users who had not been referred to eBay by Defendants' advertisements, thereby injuring eBay." As set forth in detail below, eBay's allegations do not, and cannot, form the basis of claims against Defendants under either the Computer Fraud and Abuse Act ("CFAA") or the Racketeer Influenced and Corrupt Organizations Act ("RICO"). eBay's action (which will be successfully defended) is nothing more than a commercial dispute between the parties. Indeed, eBay's agent, CJ, has already filed and is currently prosecuting in the Superior Court of the

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[1] The remainder of the claims asserted by eBay in the Complaint are state law claims, namely violation of California Penal Code § 502, violation of California Business and Professions Code § 17200, restitution and unjust enrichment and common law fraud.

[2] Defendants Brian Dunning, Thunderwood and Briandunning.com shall collectively be referred to herein as "Defendants."

State of California, County of Orange an action against Defendants for breach of contract and violation of California Business and Professions Code § 17200 ***based on the very same "cookie stuffing" scheme alleged by eBay in this case.***

Notwithstanding the inability of eBay to state claims under CFAA and RICO (the only federal claims alleged in the Complaint), eBay is well aware that federal court is an improper forum for its claims. eBay is party to a venue selection clause contained in the contract between the parties which provides that ***"[t]he exclusive forum for any actions related to this Agreement shall be in the state courts, and, to the extent federal courts have exclusive jurisdiction, in Los Angeles, California."*** Even without this unequivocal venue selection agreement, there is no basis for venue in the Northern District of California. eBay knows that Defendants are located in Orange County, that its agent CJ is located in Santa Barbara and that all alleged acts of Defendants could only have been performed in Orange County.

In sum, the Complaint is a sham with respect to the claims based on federal law. In selecting a federal forum in the District where its headquarters are located, and 400 miles from Defendants' residence and 400 miles from where its own agent is already prosecuting claims based on the same allegations, eBay attempts to fit a square peg into a round hole by invoking wholly inapplicable federal statutes, while completely disregarding the forum selection clause inserted in the contract which mandates that any federal claims be filed in the Central District.

2. BACKGROUND AND SUMMARY OF ALLEGATIONS

As mentioned above, KFC was under contract with eBay and eBay's agent CJ to promote and direct on-line traffic to eBay's website. KFC was paid by eBay via its agent CJ pursuant to a commission structure based on the amount of on-line traffic visiting eBay's website as a result of KFC's efforts, as well as the number and amount of sales by eBay generated from such traffic.

In the Complaint eBay alleges that it used CJ as its agent to administer its "Affiliate Marketing Program" whereby CJ on behalf of eBay "was responsible for, among other things, recruiting affiliates, tracking affiliate traffic, monitoring compliance by affiliates, preventing and detecting fraudulent activity, and paying affiliates using funds remitted by eBay." (Complaint at ¶ 20).

As part of securing "affiliates" for eBay's Affiliate Marketing Program, CJ and eBay entered into "Publisher Service Agreements" ("PSA") with affiliates such as KFC. The PSA alleged by CJ in its currently pending state court action filed in Orange County (the "State Court Action") applicable to KFC is attached to the Second Amended Complaint filed in the State Court Action.[3] Paragraph 9(d) of the PSA contains the following forum selection clause:

> This Agreement is governed by the laws of the State of California (USA), except for its conflict of law provisions. ***The exclusive forum for any actions related to this Agreement shall be in the state courts, and, to the extent that federal courts have exclusive jurisdiction, in Los Angeles, California.*** The parties consent to such venue and jurisdiction and waive any right to a trial by jury. (Emphasis added.)

In addition to the PSA, affiliates such as KFC were required to enter into a Supplemental Terms and Conditions Agreement with CJ and eBay (the "T&C Supplement"). The T&C Supplement expressly affirms and supplements the terms of the PSA which contains the venue selection clause cited above:

> eBay Terms and Conditions
>
> eBay Affiliate Program - Supplemental Terms and Conditions
>
> ***In consideration for Your participation in the Affiliate Program (the "Program") maintained by eBay Inc. ("eBay") through Commission Junction, Inc. ("CJ"), You agree to comply with these Supplemental Terms and Conditions ("Terms and Conditions") in addition to the terms of the Commission***

[3] A true and correct copy of the Second Amended Complaint filed in the State Court Action (together with the PSA attached as Exhibit "A" thereto) is attached to Defendants' separately filed Compendium of Exhibits ("Compendium") as Exhibit "1." The PSA is separately attached to the Compendium as Exhibit "2."

> ***Junction Publisher Service Agreement ("PSA")***. If any of these Terms and Conditions conflict with those of the PSA, then these Terms and Conditions will control. Capitalized terms not defined herein have the meanings set forth in the PSA. (Emphasis added.)[4]

The T&C Supplement does not contain a venue selection clause in conflict with the one contained in the PSA.

eBay's claims alleged in the Complaint are based on an alleged "cookie stuffing" scheme whereby Defendants, in the course of their contractual relationship with eBay, allegedly placed "cookies" on internet user's browsers which "redirected the user's computer to the eBay site" without the user's knowledge thereby causing "KFC to receive payment for actions by users who had not been referred to eBay by Defendants' advertisements, thereby injuring eBay." Upon an internet user being directed to eBay's site, eBay allegedly drops a cookie of its own on the user's browser to "read" the cookie allegedly dropped by Defendants. The alleged scheme is more specifically alleged as follows:

> 21. eBay's obligation to pay commissions is tracked by matching a user's Revenue Actions on eBay's site to the affiliate that directed the user to eBay. This tracking is accomplished through the use of a digital tag called a "cookie" that is stored ***in the user's web browser***. Cookies are collections of data commonly used by websites to store and associate useful information with a given user. . . . Cookies are placed or "dropped" in a user's browser by a website when that user visits the website. (Complaint at ¶ 21, emphasis added.)
>
> 22. In the case of eBay's Affiliate Marketing Program, cookies are used to confirm that a user was directed to eBay from

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[4] A true and correct copy of the T&C Supplement is attached to the Compendium as Exhibit "3."

a specific affiliate. Specifically, when a user clicks on an affiliate advertisement and is directed to eBay's site, ***eBay's site drops a cookie on the user's computer. That cookie identifies the site that referred the user to eBay and/or the specific affiliate responsible for directing the traffic to eBay***. . . . (Complaint at ¶ 22, emphasis added.)

The Fraudulent "Cookie Stuffing" Schemes

24. "Cookie stuffing" is a term used to describe the forced placement of a cookie on a computer, typically by causing a cookie from a particular website to be placed ***on the user's computer*** without the user knowing that he or she visited the website that placed the cookie. DPS and KFC engaged in cookie stuffing intended to defraud eBay. The allegations set forth in paragraphs 24-30,36-37,42-43 and 50-51 below describing Defendants' cookie stuffing schemes based on eBay's information and belief are based on eBay's analysis of the Defendants' websites and/or technology and the way in which a user's web browser interacts with Defendants' sites and/or technology, and on eBay's analysis of historical data relating to traffic purportedly driven to eBay by Defendants. Certain other details regarding Defendants' cookie stuffing schemes are exclusively within Defendants' control. (Complaint at ¶ 24, emphasis added.)

25. eBay is informed and believes and, on that basis, alleges that DPS and KFC each accomplished their cookie stuffing through software programs and/or code that, ***unbeknownst to the user***, redirected the user's computer to the eBay website without the user actually clicking on an eBay advertisement link, or even becoming aware that they had left the page they were previously

viewing. As a result, the eBay site would be prompted to drop an eBay cookie ***on the user's computer*** even though the user never clicked on an eBay advertisement or even realized that their computer had ever visited the eBay site. (Complaint at ¶ 25, emphasis added.)

26. eBay is informed and believes and, on that basis, alleges that the software programs utilized by each of DPS and KFC caused ***the user's computer to access eBay's computers*** in an unauthorized way and/or to exceed the authorized access to eBay's computers because that access occurred solely to force ***the dropping of the eBay cookie*** and thereby wrongfully associate future Revenue Actions, if any, by that user with DPS or KFC. (Complaint at ¶ 26, emphasis added.)

27. eBay is informed and believes and, on that basis, alleges that once the cookie was stuffed ***on the user's computer*** by one or more of the Defendants, any future Revenue Actions initiated by that user when the user later visited eBay intentionally, and not as a result of any advertisement placed by Defendants, appeared to be eligible for commissions payable to one of the Defendants (provided those actions took place within the prescribed periods of time). . . . (Complaint at ¶ 27, emphasis added.)

28. eBay is informed and believes and, on that basis, alleges that DPS and/or KFC used certain technological measures to prevent eBay from discovering their wrongdoing. At certain relevant times DPS and/or KFC used technology that ***would stuff***

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cookies on only those computers that had not been previously stuffed by that Defendant. . . . (Complaint at ¶ 28, emphasis added.)

As such, all of eBay's "cookie stuffing" allegations involve the dropping of cookies, by both eBay and Defendants, ***on internet users' computers***. eBay does not allege, and cannot allege, that any cookies were placed on its computers by Defendants or that Defendants in any way otherwise ***accessed*** eBay's computers. Based on these specific allegations, eBay alleges separate claims against Defendants for (1) violation of the CFAA, (2) violation of RICO (alleged only against the individual defendants including Brian Dunning), (3) violation of California Penal Code § 502, (4) violation of California Business and Professions Code § 17200, (5) restitution and unjust enrichment and (6) common law fraud.

Prior to the commencement of this action on January 4, 2008, eBay's agent CJ commenced an action in the California Superior Court, County of Orange against KFC, Thunderwood, Mr. Dunning and others, for breach of contract, violation of California Business & Professions Code § 17200, declaratory relief, conversion, and certain common counts.[5] CJ's claims are based on the same conduct alleged by eBay in the Complaint. More specifically, CJ alleges in the State Court Action that Defendants "breached the Agreement [i.e., the PSA] by, *inter alia*, ***inflating traffic, forcing cookies, infringing on others proprietary rights, providing links and widgets to wrongfully promote and/or force traffic to ebay.com, and promoting objectionable content as that is defined in the Agreement [i.e., the PSA]."*** (Compendium at Exhibit "1" (¶ 16, emphasis added).)

As set forth below, the Complaint should be dismissed because eBay cannot state federal claims upon which relief can be granted. In the alternative, the action should be dismissed on the basis of improper venue.

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[5] See Compendium at Exhibit "1."

3. THE APPLICABLE LEGAL STANDARD SUPPORTING DISMISSAL OF EBAY'S CFAA AND RICO CLAIMS FOR FAILURE TO STATE UPON WHICH RELIEF CAN BE GRANTED

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is based upon the facts alleged in the Complaint, any documents attached to the Complaint, and matters appropriately judicially noticed. But a court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003); *Nissan Motor Co. v. Nissan Computer Corp.*, 204 F.R.D. 460,463 n.S (C.D. Cal. 2001) ("Under 12(b)(6), 'the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.'"). The Court should test the sufficiency of the Complaint only after excising from consideration all unsupported conclusory allegations. See *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992).

A. eBay's CFAA Claim Must Be Dismissed For Failure To State A Claim

Under the CFAA, a person may maintain a civil action if the complained of conduct falls within certain provisions. 18 U.S.C. § 1030(g). Specifically, for civil liability to attach, a plaintiff must adequately allege facts establishing that the alleged violator committed one of the offenses set forth in the CFAA and that the alleged offense "involves 1 of the factors set forth in clause (I), (II), (III), (IV) or (V) of subsection (c)(4)(A)(i)." 18 U.S.C. § 1030(g).

Here, eBay does not identify a specific section of the CFAA violated by Defendants. Rather, eBay alleges that "[t]hrough their cookie stuffing scheme as described above, [Defendants] each knowingly, intentionally and with intent to defraud ***accessed eBay's computers*** without authorization and/or exceeding their authorized access to eBay's computers in order to further their fraudulent scheme." (Complaint at ¶ 34.) eBay goes on to allege that "[t]hrough their unauthorized ***access***, [Defendants] fraudulently obtained commissions for Revenue Action that were in no way related to those Defendants' advertisements and for which those Defendants were due no compensation." (Complaint at ¶ 38.)

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A violation under subsection (a)(4) of the CFAA involves someone who "knowingly and with intent to defraud, ***accesses a protected computer*** without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period." (Emphasis added.) It is assumed, therefore, that section (a)(4) of the CFAA is the alleged violation underlying eBay's civil action brought pursuant to section (g) of the CFAA.

eBay's CFAA claim fails for three reasons. First, Plaintiff has not (and cannot) adequately allege that Defendants accessed eBay's computer. Thus, there can be no liability under subsection (a)(4). Second, eBay has not (and cannot) allege that it suffered any "damage," as that term is defined under the CFAA, as a result of Defendants' alleged conduct. Third, eBay has not (and cannot) allege that it suffered a "loss," as that term is defined under the CFAA, as a result of Defendants' alleged conduct. Thus, there can be no civil liability under the CFAA.

(1) eBay Has Failed To Sufficiently Allege That Defendants Accessed eBay's Computer

According to eBay's Complaint, the "cookie stuffing" scheme alleged involved the alleged placing of "cookies" by Defendants on internet users' computers, not on eBay's computers. (Complaint at ¶¶ 21-28, 34 and 38 as set forth above.) More specifically, eBay alleges that "cookies" are "stored in the user's web browser" (Complaint at ¶ 21), and that "cookie stuffing" is a term to describe the forced placement of a cookie on a computer, typically by causing a cookie from a particular website to be placed ***on the user's computer***. . . ." (Complaint at ¶ 24.) eBay alleges that "the cookie was stuffed ***on the user's computer*** by one or more Defendants. . . ." (Complaint at ¶ 27), and that "[Defendants] used technology that would stuff cookies on only ***those computers*** that had not previously been stuffed." (Complaint at ¶ 28.)

What is more, eBay alleges that when an internet user was directed to eBay's website as a result of Defendants' alleged cookie stuffing on the internet user's computer, "eBay's site drops a cookie on the user's computer" to read the cookie allegedly stuffed by Defendants which tells eBay that KFC directed the particular internet user to the eBay site. (Complaint at ¶ 22.) Of course eBay does not (because it cannot) allege that ***its*** dropping of a cookie on the computer of an internet user is known to the internet user or whether such "access" is authorized by the user. eBay's single passing allegation made on information and belief that Defendants "caused the user's computer to access eBay's computer in an unauthorized way" is insufficient to establish access under the CFAA and is belied by eBay's allegations that it dropped cookies ***on users' computers*** to read the cookies dropped by Defendants ***on users' computers, and the absence of any allegation that Defendants' dropped cookies on eBay's computers, or otherwise directly accessed eBay's computers***.

While the term "access" is not defined in the CFAA and there is a paucity of authority as to its meaning, cases where the CFAA has been held to apply generally apply the standard, everyday meaning of accessing a computer. For example, a substantial number of cases involving application of the CFAA involve an employee of the plaintiff accessing by physically logging-on the computers of the plaintiff to obtain or delete information on the employer's computer system. E.g., *United States v. Sablan*, 92 F.3d 865 (9th Cir. 1996); *ViChip Corp. v. Lee*, 438 F.Supp.2d 1087 (N.D. Cal. 2006); *International Airport Centers, LLC v. Citrin*, 440 F.3d 418, on subsequent appeal 455 F.3d 749 (7^{th} Cir. 2006); *Pacific Aerospace & Electronics, Inc. v. Taylor*, 295 F.Supp.2d 1188 (E.D. Wash. 2003). As far as Defendants' research has revealed, no case law exists where a scheme such as that alleged by eBay has been deemed an "accessing" of computers within the contemplation of the CFAA.

Therefore, this Court should find that, based on eBay's allegations, eBay has not (and cannot) allege that Defendants accessed its computers as required to state a claim under the CFAA.

(2) eBay Has Failed To Sufficiently Allege Damage Or Loss Under The CFAA

In order to state a cause of action under the CFAA, a plaintiff must allege "damage" or "loss," as those terms are defined under the CFAA. 18 U.S.C. § 1030(g).

"Damage" is defined as "impairment to the integrity or availability of data, a program, a system or information." 18 U.S.C. § 1030(e)(8). Loss is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11).

Here, eBay fails to sufficiently plead "damage" or "loss" as those terms are defined under the CFAA. eBay has not (and cannot) allege that Defendants' purported cookie stuffing scheme impaired the integrity or availability of data, a program, a system or information of eBay's. As set forth above, eBay does not allege that its computers were accessed, therefore no information or data maintained by eBay could have been impaired. Simply put, nothing of eBay was "damaged" as that term is defined in the CFAA. eBay claims it suffered "damages" as a result of Defendants' conduct, however the paying of commissions to Defendants which eBay claims were not owed is not "damage" within the meaning of the term as expressly set forth in the CFAA.

eBay has also failed to adequately allege that it suffered a "loss" as that term is defined in the CFAA. eBay alleges generally that Defendants' alleged access to its computers and the alleged fraudulent obtaining of commissions "caused loss to eBay in each year from at least December 2004 to December 2007, aggregating more than $5,000." (Complaint at ¶ 38.) This allegation, without more, is not enough to maintain a civil cause of action under the CFAA. Under the CFAA, "loss" has consistently meant the cost of investigating or remedying damage to a computer or the cost incurred because the computer's service was interrupted. *Nexans Wires, S.A. v. Sark-USA, Inc.*, 319 F.Supp.2d 468, 475 (S.D.N.Y. 2004). Moreover, the alleged "loss" must also somehow relate to the complained-of-conduct. See *Civic Center Motors, Ltd v. Mason Street Import Cars, Ltd,* 387 F.Supp.2d 378, 381 (S.D.N.Y. 2005) (holding that the alleged loss must relate to investigating or remedying damage to the computer at issue or the inoperability of the accessed computer system). eBay's allegations of "loss" are therefore insufficient to maintain a claim under the CFAA.

eBay may assert *Creative Computing v. Getloaded.com*, 386 F.3d 930 (9th Cir. 2004), for the proposition that the reference to "economic damages" at section (g) of the CFAA allows for the type of compensatory damages alleged by eBay in the Complaint–i.e., the return of monies allegedly not owed to Defendants. However, *Creative Computing* does not support such an argument. Although the *Creative Computing* court interpreted "economic damages" to include such items as loss of business and goodwill, the court affirmed that ***"[d]amages are indeed limited to those caused by the impairment***. . . ." *Creative Computing*, 386 F.3d at 936. As such, there can be no question that impairment of eBay's computer system (*i.e.*, "damage" as defined at 18 U.S.C. § 1030(e)(8)) is a prerequisite to any allowance of economic damages and that any such damages must have been caused by such impairment. In this case, eBay does not, because it cannot, allege the impairment of its computer system as a result of any conduct of Defendants. Indeed, as set forth above, eBay does not (because it cannot) adequately allege that Defendants accessed its computer system at all.

Accordingly, for the reasons set forth above, eBay's CFAA claim against Defendants must be dismissed for failure to state a claim.

B. eBay's RICO Claim Must Be Dismissed For Failure To State A Claim

18 U.S.C. § 1962(c) provides, in pertinent part:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interested commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering or collection of unlawful debt."

Despite its many complexities, RICO at its core has a fairly simple design: it prohibits a person from using a pattern of unlawful activities to infiltrate an interstate enterprise. 18 U.S.C. § 1962. To avoid abuse of the statute, the courts wisely take a close look at RICO claims to be assured that all the necessary elements are alleged. To state a civil RICO claim, a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to plaintiffs' 'business or property.'" *Ove v.*

Gwinn, 264 F.3d 817, 825 (9th Cir. 2001). To try to minimize the temptation for would-be RICO plaintiffs to recast ordinary commercial disputes as racketeering activity, courts strictly require a RICO complaint to allege every essential element of each predicate act. See, e.g., *Sanville v. Bank of America National Trust & Savings Ass'n*, 18 Fed.Appx. 500, 501 (9th Cir. 2001) (affirming the dismissal of plaintiff's RICO claims for failure to plead with sufficient particularity that the defendants had the specific intent to deceive or defraud as required for both mail and wire fraud). Here, eBay is a prime example of a would-be RICO plaintiff who is trying to manufacture a RICO complaint out of nothing. Even the most generous reading of the Complaint does not show any predicate acts of "racketeering activity" that meet the standards for a RICO claim.

The only enumerated predicate acts alleged in the Complaint are alleged wire and mail fraud. (Complaint at ¶ 45.)[6] Allegations of wire and mail fraud, like any other fraud, must be made with particularity under Federal Rule of Civil Procedure 9(b). ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.") *McLaughlin v. Anderson*, 962 F.2d 187 (2d Cir 1992). Because this particularity requirement of federal pleading rules applies to claims of mail and wire fraud, the complaint must set forth ***the time, place and contents of alleged false representation, the identity of the party making the false statements and the consequences thereof.*** *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006). The rule of particularity certainly is not relaxed for RICO claims. Courts do and should scrutinize RICO claims of mail or wire fraud with the same or greater care as they do with any other claims of fraud. See *Tate v. PG&E Corp.*, 94 Fed.Appx. 529 (9th Cir. 2004) (the heightened pleading standards applicable to fraud claims apply to a RICO action alleging predicate acts of mail fraud.)

eBay's allegations are not sufficiently specific. eBay fails to explain the alleged mail fraud in ***any*** detail. As to the alleged wire fraud, eBay fails to include any specifics as to the time, place and number of alleged wire fraud incidents. eBay alleges only that the alleged

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[6] Violation of the CFAA (18 U.S.C. § 1030) is not a predicate act enumerated at 18 U.S.C. § 1961(1).

"cookie stuffing" was "repeated multiple times" and that the alleged scheme continued "from approximately December 2004 through June 2007." (Complaint at ¶¶ 44 and 45.) The Complaint is devoid of any allegations of Defendant Brian Dunning's specific role and/or participation in the alleged scheme. As such eBay fails to state a RICO claim on this basis alone.

In addition, eBay fails to state a valid RICO claim because eBay alleges only a single purported fraudulent scheme against a single purported victim. Such allegations do not constitute the "pattern" of racketeering activity that is a prerequisite to a civil cause of action under the Act. RICO prohibits the use of a "pattern" of predicate acts, or the proceeds thereof, to gain an interest in or control of an interstate enterprise. The purpose of the pattern requirement is ***"to weed out garden variety fraud allegations and to prevent RICO from being misused as a tool wherewith a disgruntled party may exact disproportionate vengeance against his partners or associates when their business dealings turn sour."*** *Hunter v. J. Craig Constr. Co.*, 51 F3d 275 (Table), 1995 WL 141359, at 1 (7th Cir. Marc. 30, 1995); see also *Medallion Television Ent. V. SelecTV of California, Inc.*, 833 F.2d 1360, 1363-1364 (9th Cir. 1988) (RICO claim dismissed—***"this case involved but a single alleged fraud with a single victim."***); *Royce International Broadcasting Corp. v. Field*, 2000 WL 236434, 4 (N.D. Cal. 2000) ("RICO was not intended to provide Federal remedy to 'every common law cause of action available to remedy business deals gone sour.'")

Here, there is alleged a single scheme, namely, "cookie stuffing" on internet users' computers which directed such users to eBay's site resulting in eBay's payment of unearned contract based commissions to Defendants. One alleged scheme, one alleged victim. A single alleged scheme, even if alleged to have taken place over years, directed against a single victim, simply cannot constitute a "pattern" of racketeering activity for RICO purposes. See, e.g., *Al-Abood v. El-Sfiamari*, 217 F.3d 225, 238 (4th Cir. 2000) (series of events against single victim, alleged to inflict injury over a period of years, does not constitute a pattern within the meaning of RICO); *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir.

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1988) (same; to find otherwise would transform every business dispute into a cause of action under RICO).

eBay does not, and cannot, state a claim under RICO against Defendant Brian Dunning. eBay's RICO claims should be dismissed.

4. THIS COURT LACKS JURISDICTION OVER EBAY'S STATE LAW CLAIMS AND THE ACTION SHOULD BE DISMISSED

For the reasons discussed above, eBay's federal statutory claims are fatally flawed. Without them, this Court should not exercise supplemental jurisdiction over eBay's claims under California law. eBay has not, because it cannot, asserted diversity jurisdiction because the parties are not completely diverse. It is axiomatic that when the Court's jurisdiction over state law claims rests solely on supplemental jurisdiction under § 1367, and the federal claims are dismissed, the Court should also dismiss the state law claims for failure of jurisdiction. 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Trigon Ins. Co. v. Columbia Naples Capital, LLC*, 235 F.Supp.2d 498, 507 (E.D. Va. 2002) (Hudson, J.) (dismissing state claims where federal claims dismissed under Rule 12(b)(6)).

5. IN THE ALTERNATIVE, THE ACTION SHOULD BE DISMISSED (OR TRANSFERRED) FOR IMPROPER VENUE

Forum selection clauses are ***presumed valid*** under federal law and enforcement will be ordered unless it clearly would be "unreasonable and unjust, or the clause was invalid for such reasons as fraud or over-reaching." *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 512 (9th Cir. 1988).

As set forth above, the PSA contains the following forum selection clause:

> This Agreement is governed by the laws of the State of California (USA), except for its conflict of law provisions. ***The exclusive forum for any actions related to this Agreement shall be in the state courts, and, to the extent that federal courts have exclusive jurisdiction, in Los Angeles, California.*** The parties consent to

such venue and jurisdiction and waive any right to a trial by jury. (Emphasis added.)

eBay cannot argue that the forum selection clause is unreasonable, unjust or invalid for such reasons as fraud or over-reaching. Indeed, the PSA was prepared by eBay (whether through its agent CJ or not) and KFC was required by eBay to enter into the PSA in order to participate in eBay's Affiliate Marketing Program. Defendants had nothing to do with the drafting or content of the venue selection clause at issue. eBay cannot disown the provision it drafted and required KFC to agree to simply because eBay believes the provision no longer suits it.

Notwithstanding the venue selection clause, venue is not proper in the Northern District. Pursuant to 28 U.S.C. § 1391(b) venue in federal question cases is proper in the following judicial districts and no others: (1) if all defendants reside in the same state, a district were any defendant resides, or (2) a district in which a substantial part of the events on which the claim is based occurred, or (3) if there is no district were the action can otherwise be brought, the district in which any defendant may be found.

First, eBay is well aware that all named defendants reside or are located in the Central District (Orange County) or the Southern District (San Diego County).[7] Having selected the forum, it is eBay's burden to prove otherwise. *Airola v. King*, 505 F. Supp. 30, 31 (D. Az. 1980).

Further, it cannot be reasonably disputed that the alleged events upon which the action is based could only have occurred where the named defendants reside or are located, i.e., the Central and Southern Districts. In protecting defendants from being haled into court in a remote forum, Congress' reference to "events or omissions giving rise to the claim" requires court's to focus on the relevant activities of the defendant, not the plaintiff. *Woodke v. Dahm*, 70 F. 3d 983, 985 (8th Cir. 1985). In the Complaint eBay alleges that Defendants' alleged cookie stuffing scheme was "accomplished through software programs or code."

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[7] See Declaration of Leo J. Presiado

(Complaint at § 25). It is axiomatic that the development of any such software or code was done at the Defendant's locations in the Central and Southern Districts. Again, having selected the forum, it is eBay's burden to prove otherwise. *Airola, supra*, 505 F. Supp. at 31. Moreover, eBay alleges that CJ, as its agent administered the Affiliate Marketing Program on behalf of eBay, monitored traffic, monitored compliance by affiliates, paid affiliates and prevented and detected fraudulent activity. (Complaint at § 20). eBay alleges that CJ's headquarters are located in Santa Barbara which is located in the Central District. (Complaint at § 28).[8]

Therefore, venue is not proper in the Northern District and the action should be dismissed on this basis.

6. CONCLUSION

For each of the foregoing reasons, Defendants respectfully request that the Court dismiss the Complaint with prejudice.

DATED: October 27, 2008

RUS, MILIBAND & SMITH
A Professional Corporation

By: [signature]
LEO J. PRESIADO
Attorneys for Defendants
Thunderwood Holdings, Inc., Brian Dunning
and BrianDunning.com

[8] As set forth in the Declaration of Leo J. Presiado, CJ is presently located in Westlake Village, California which is in Los Angeles County, California. See Exhibit "8" attached to the Compendium.

DECLARATION OF LEO J. PRESIADO

I, LEO J. PRESIADO, declare as follows:

1. I am an attorney at law duly licensed to practice before the above-entitled Court and am a member of the law firm of Rus, Miliband & Smith, A Professional Corporation ("RMS"), attorneys of record for Defendants Thunderwood Holdings, Inc., Brian Dunning and BrianDunning.com (collectively, "Defendants").

2. I have firsthand personal knowledge of the matters set forth herein and if called upon as a witness would and could competently testify thereto.

3. In addition to this action, RMS is counsel of record for Brian Dunning and Thunderwood Holdings, Inc. in that certain state court action commenced by Commission Junction, Inc. ("CJ") on January 4, 2008 in the Superior Court of the State of California as Case No. 30-2008 00101025 (the "State Court Action").

4. Attached as Exhibit "1" to the Compendium of Exhibits ("Compendium") filed by Defendants in support of the Motion is a true and correct copy of the Second Amended Complaint filed in the State Court Action together with Exhibits "A" and "B" attached thereto.

5. Exhibit "A" (the Publisher Services Agreement) to the Second Amended Complaint filed in the State Court Action is separately attached to the Compendium as Exhibit "2."

6. In the course of discovery conducted in the State Court Action CJ produced a document entitled "eBay Affiliate Global Ts&Cs October 1, 2005," a true and correct copy of which is attached to the Compendium as Exhibit "3."

7. Although the document attached to the Compendium as Exhibit "3" is stamped "Confidential-Attorneys Eyes Only," counsel of record for CJ in the State Court Action, Phillip Montoya, Esq. of Ernster Law Offices, P.C. confirmed that CJ does not object to the use or filing of such document in this action. A true and correct copy of Mr. Montoya's e-mail confirming the same is attached to the Compendium as Exhibit "4."

8. On October 24, 2008 I conducted an internet search of the "Business Portal" of the California Secretary of State's Office. The purpose of my search was to obtain the corporate filing and registration records of Thunderwood Holdings, Inc., Dunning Enterprises, Inc., Digital Point Solutions, Inc., and Commission Junction, Inc. Exhibits "5" through "8" attached to the Compendium were retrieved by me from the California Secretary of State website as a result of my search.

9. Exhibit "5" to the Compendium provides that Thunderwood Holdings, Inc. is located in Laguna Niguel which is in Orange County, California. Exhibit "5" also lists Brian Dunning's address as located in Laguna Niguel.

10. Exhibit "6" to the Compendium provides that Dunning Enterprises, Inc. is located in Aliso Viejo which is in Orange County, California. Exhibit "6" also lists Todd Dunning's address as located in Aliso Viejo.

11. Exhibit "7" to the Compendium provides that Digital Point Solutions, Inc. is located in San Diego, California which is located in San Diego County, California. Exhibit "7" also provides that Shawn Hogan's address is in San Diego, California.

12. Exhibit "8" to the Compendium provides that Commission Junction, Inc. is located in Westlake Village which is located in Los Angeles County, California.

13. Attached as Exhibit "9" to the Compendium is the result of a search I performed in the fictitious business name database maintained by the County of Orange, California. Exhibit "9" reflects that Kessler's Flying Circus is the registered fictitious business name of Brian Dunning and Todd Dunning.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed this 27th day of October, 2008 at Irvine, California.

LEO J. PRESIADO

REQUEST FOR JUDICIAL NOTICE

Defendants Thunderwood Holdings, Inc., Brian Dunning and BrianDunning.com (collectively, "Defendants") request that the Court take judicial notice, pursuant to Federal Rule of Evidence 201, of the following documents:

1. Second Amended Complaint filed in Superior Court of the State of California, County of Orange, Case No. 30-2008 00101025, including attached Exhibits "A" and "B."

DATED: October 27, 2008

Respectfully submitted,

RUS, MILIBAND & SMITH
A Professional Corporation

By: ______________________________
LEO J. PRESIADO
Attorneys for Defendants
Thunderwood Holdings, Inc., Brian Dunning
and BrianDunning.com

PROOF OF SERVICE
eBay, Inc. v. Digital Point Solutions, Inc., et al.
Northern District of California, San Jose Division
Case No. C 08-4052

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2211 Michelson Drive, Seventh Floor, Irvine, California 92612.

On **October 27, 2008**, I served the foregoing documents described as **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT BY DEFENDANTS THUNDERWOOD HOLDINGS, INC., BRIAN DUNNING AND BRIANDUNNING.COM; MEMORANDUM OF POINTS AND AUTHORITIES INS SUPPORT THEREOF; REQUEST FOR JUDICIAL NOTICE; DECLARATION OF LEO J. PRESIADO** on the interested parties in this action by placing a copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

✓ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

___ (By E-Mail) As follows: I caused the above-referenced document(s) to be transmitted to the above-named persons.

___ (By Facsimile) As follows: I caused the above-referenced document(s) to be transmitted to the above-named persons by facsimile.

___ (By Hand Delivery) As follows: I caused the above-referenced document(s) to be hand delivered to the above-named persons.

___ (By Overnight Delivery) As follows: By overnight delivery via Overnite Express and/or Federal Express to the office of the addressee noted on the attached service list.

Executed on **October 27, 2008**, at Irvine, California.

___ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

✓ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

RHONDA RADFORD

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